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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 David McNulty,

10 Plaintiff,

11 v.

12 Andrew Saul,

13 Defendant.
14

No. CV-19-00364-TUC-LCK

ORDER

15 Plaintiff David McNulty filed this action pursuant to 42 U.S.C. § 405(g) seeking
16 judicial review of a final decision by the Commissioner of Social Security (Commissioner),
17 Andrew Saul. (Doc. 1.) Before the Court are McNulty's Opening Brief, Defendant's
18 Responsive Brief, and McNulty's Reply. (Docs. 17-19.) The parties have consented to
19 Magistrate Judge jurisdiction. (Doc. 13.) Based on the pleadings and the administrative
20 record, the decision of the Commissioner is remanded for further proceedings.

21 **FACTUAL AND PROCEDURAL HISTORY**

22 McNulty was born in 1971 and was 40 years of age at the alleged onset date of his
23 disability. (Administrative Record (AR) 223.) He had past relevant work experience as a
24 bouncer, cashier, construction laborer, and cab driver. (AR 58-61, 249.) McNulty filed an
25 application for Disability Insurance Benefits (DIB) and Supplemental Security Income
26 (SSI) in January 2016. (AR 214-24.) McNulty's application was denied upon initial review
27 (AR 68-107) and on reconsideration (AR 108-24). After a March 14, 2018 hearing (AR
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1 35-67), the ALJ found McNulty was not disabled. (AR 15-29.) The Appeals Council denied
2 McNulty's request for review of that decision. (AR 1.)

3 The ALJ found that McNulty had severe impairments of degenerative disc disease,
4 affective disorder, and anxiety disorder. (AR 17.) The ALJ determined McNulty had the
5 Residual Functional Capacity (RFC) to perform light-exertion work with the following
6 parameters: lift or carry 20 pounds frequently and 25 pounds occasionally; stand/walk and
7 sit for a total of 6 hours each; occasionally climb ladders/ropes/scaffolds; frequently climb
8 ramps/stairs, balance, stoop, and kneel; and a limit to occasional superficial interaction
9 with the public and coworkers. (AR 20.) The ALJ concluded at Step Five, based on the
10 testimony of a vocational expert (VE), that McNulty could perform work that exists in
11 significant numbers in the economy: janitor, ad materials distributor, and courier
12 messenger. (AR 28.)

13 STANDARD OF REVIEW

14 The Commissioner employs a five-step sequential process to evaluate SSI and DIB
15 claims. 20 C.F.R. §§ 404.1520; 416.920; *see also Heckler v. Campbell*, 461 U.S. 458, 460-
16 462 (1983). To establish disability the claimant bears the burden of showing he (1) is not
17 working; (2) has a severe physical or mental impairment; (3) the impairment meets or
18 equals the requirements of a listed impairment; and (4) claimant's RFC precludes him from
19 performing his past work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). At Step Five, the
20 burden shifts to the Commissioner to show that the claimant has the RFC to perform other
21 work that exists in substantial numbers in the national economy. *Hoopai v. Astrue*, 499
22 F.3d 1071, 1074 (9th Cir. 2007). If the Commissioner conclusively finds the claimant
23 "disabled" or "not disabled" at any point in the five-step process, he does not proceed to
24 the next step. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).

25 "The ALJ is responsible for determining credibility, resolving conflicts in medical
26 testimony, and for resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
27 Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)). The findings
28 of the Commissioner are meant to be conclusive if supported by substantial evidence. 42

U.S.C. § 405(g). Substantial evidence is “more than a mere scintilla but less than a preponderance.” *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)). The court may overturn the decision to deny benefits only “when the ALJ’s findings are based on legal error or are not supported by substantial evidence in the record as a whole.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001). This is so because the ALJ “and not the reviewing court must resolve conflicts in the evidence, and if the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019 (quoting *Richardson v. Perales*, 402 U.S. 389, 400 (1971)); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004). The Commissioner’s decision, however, “cannot be affirmed simply by isolating a specific quantum of supporting evidence.” *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998) (citing *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989)). Reviewing courts must consider the evidence that supports as well as detracts from the Commissioner’s conclusion. *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975).

DISCUSSION

McNulty alleges the ALJ failed to evaluate the opinion of social worker Allison Davis. McNulty clarified that he is challenging the ALJ’s findings only as to his mental limitations in the instant appeal (Doc. 17 at 3); therefore, the Court does not discuss the ALJ’s findings regarding his somatic impairments.

Background

On March 10, 2015, after a meeting with McNulty, social worker Davis discharged him from a Compensated Work Therapy (CWT) program run by the VA. (AR 969.) At that time, she offered the following assessment:

Veteran is not able to accept feedback and is unable to see the areas in which he needs to improve. He clearly feels that writer and supervisor are picking on him. Veteran will not be able to benefit from the program if unable to take direction and feedback about performance.

(*Id.*) Davis recommended anger management or life skills groups for McNulty. (*Id.*) After a follow-up meeting, Davis stated that McNulty “appears to have unrealistic expectations

1 about getting feedback in employment situation as he feels that he should be thanked and
2 patted on the back when he does what is expected of him.” (AR 959.)

3 McNulty quoted this testimony from Davis in a pre-hearing brief and argued to the
4 ALJ that his inability to accept direction or criticism from supervisors, due to his mental
5 health issues, was a major barrier to employment. (AR 317.) At the hearing, the ALJ asked
6 McNulty about his experience in the CWT program. (AR 43-46.) McNulty acknowledged
7 that his supervisors complained about his job performance, including sleeping on the job
8 and leaving early. (AR 45.) McNulty further testified that when he was confronted about
9 these issues, he argued about it because he disagreed with what they said to him, they did
10 not give him positive feedback, and he felt they treated him unfairly. (AR 46.) In response
11 to a question from McNulty’s attorney, the VE testified that if a claimant “cannot be around
12 any supervisors or co-workers at all, and they can’t take any supervision at all, maybe the
13 individual would tend to have outbursts . . . then that might impact their ability to maintain
14 competitive work without a special accommodation . . .” (AR 63.) The VE also opined
15 that a person could not work if “an individual had a marked limitation, so at least 50 percent
16 of the time they would not interact appropriately with supervisors.” (AR 64.) Further, the
17 behaviors Davis documented would be unacceptable if they occurred at a marked level.
18 (AR 64-65.)

19 In her decision, the ALJ summarized McNulty’s testimony as, “[h]e stated he
20 worked in a clothing room for VA vocational rehabilitation and supervisors complained
21 about him leaving early, and he was unable to work in a competitive environment.” (AR
22 21.) The ALJ did not mention Davis’s opinion nor discuss McNulty’s ability to interact
23 appropriately with supervisors.

24 **Analysis**

25 An ALJ is required to consider lay witness evidence about the severity of a
26 claimant’s impairments, his daily activities, restrictions, and his ability to work. 20 C.F.R.
27 §§ 404.1513(d)(4), 416.913(d)(4); *Stout v. Comm’r Soc. Sec. Admin.* 454 F.3d 1050, 1056
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1 (9th Cir. 2006). Rejection of such testimony requires an ALJ to provide reasons germane
2 to each witness. *Stout*, 454 F.3d at 1056.

3 First, Defendant argued that Davis's statements in her progress notes did not qualify
4 as a medical opinion or lay witness testimony. Davis's statements are not a medical
5 opinion, and the Court does not treat them as one. Although McNulty cited the regulatory
6 definition of a medical opinion, he requests that Davis's testimony be evaluated as that of
7 a lay witness. (Doc. 17 at 7-8.) With regard to treating Davis's statements as relevant lay
8 witness testimony, Defendant argued only that an ALJ need not discuss every reference in
9 the record to a claimant's functioning. Although this record is large, the ALJ was alerted
10 to Davis's statements prior to the hearing, she questioned McNulty about the negative
11 feedback he received from his CWT supervisors, and McNulty's attorney questioned the
12 VE with hypotheticals derived from Davis's statements. Thus, the ALJ was aware, and
13 acknowledged the significance, of this evidence. Because no other evidence considered by
14 the ALJ discussed McNulty's ability to respond appropriately to supervision, this evidence
15 was significant and probative. *Cf. Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012
16 (9th Cir. 2003) (finding a medical review was not significant and probative because ALJ
17 discussed the report that formed the basis for that review).

18 Second, Defendant argued that medical records documented McNulty's cooperative
19 and polite demeanor, which was an adequate basis for the ALJ to reject Davis's testimony.
20 (Doc. 18 at 16, 18.) Behaving in a sociable manner at medical appointments does not mean
21 an individual has the ability to accept supervisory feedback and direction. Further, the ALJ
22 did not reject Davis's testimony based on the medical record or any other reason. *See*
23 *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014) ("We review only the reasons
24 provided by the ALJ in the disability determination and may not affirm the ALJ on a ground
25 upon which he did not rely.")

26 Third, Defendant argued that the ALJ considered McNulty's testimony about
27 working in the CWT program. The ALJ's summary of McNulty's testimony on this topic
28 acknowledged only that he was reprimanded for leaving early and, generally, could not

1 maintain competitive employment. (AR 21.) The ALJ did not address McNulty's ability to
2 accept supervisory criticism either through discussion of his testimony or by considering
3 Davis's testimony.

4 Finally, Defendant argued that Davis's testimony did not directly correlate to the
5 hypothetical McNulty's attorney posed to the VE. While true, McNulty has not asked the
6 Court to credit as true Davis's testimony and award benefits. Instead, he requests a remand
7 for further proceedings. Because the ALJ failed to consider Davis's testimony, she erred.
8 *See Stout*, 454 F.3d at 1054 (finding error when ALJ made passing reference to lay witness
9 testimony but failed to mention testimony specific to claimant's ability to work); *Bruce v.*
10 *Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009) (reversing because ALJ failed to provide
11 legitimate reasons for rejecting testimony of claimant's wife regarding his ability to work).

12 This error will be found harmless if it would not have altered the outcome of
13 McNulty's case. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir.
14 2008) (finding error harmless if it was "inconsequential to the ultimate nondisability
15 determination") (quoting *Stout*, 454 F.3d at 1055). However, "a reviewing court cannot
16 consider [an] error harmless unless it can confidently conclude that no reasonable ALJ,
17 when fully crediting the testimony, could have reached a different disability
18 determination." *Marsh v. Colvin*, 792 F.3d 2170, 1173 (9th Cir. 2015) (quoting *Stout*, 454
19 F.3d at 1055-56). "[T]he burden of showing that an error is harmful normally falls upon
20 the party attacking the agency's determination." *Shinseki v. Sanders*, 556 U.S. 396, 409
21 (2009).

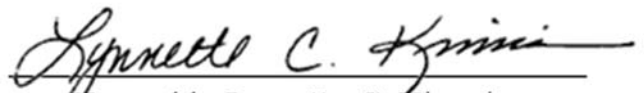
22 Defendant did not argue any error regarding Davis's testimony was harmless, and
23 the Court concludes it was not. The testimony from Davis was unique because no other
24 evidence of record evaluated McNulty's ability to respond appropriately to supervision.
25 No treating or examining mental health professional provided a medical opinion of
26 McNulty's functional abilities. And, because the reviewing psychologists found no severe
27 impairments and only mild limitations, they did not evaluate McNulty's RFC. (AR 87-90,
28 103.) The ALJ rejected the reviewers' findings, in part, and found two severe mental health

1 impairments and a moderate limitation in social functioning. (AR 17, 19.) In finding a
2 moderate limitation, the ALJ appeared to rely solely upon McNulty's testimony. (AR 19,
3 27.)¹ McNulty testified that he had been reprimanded for his job performance in the CWT
4 program; however, he believed the problem lay with the supervisors not his performance
5 or response to the supervisory feedback. (AR 46.) Therefore, the ALJ did not evaluate
6 whether or how the evidence from Davis would impact his ability to work. And, the ALJ
7 included in the RFC only a limitation with respect to the public and coworkers, but none
8 with respect to interacting with supervisors. In light of the VE's testimony, that a
9 significant limitation in responding appropriately to supervision would preclude all
10 employment, Davis's testimony could have impacted the ALJ's disability determination.
11 Therefore, the error was not harmless. Upon remand, the ALJ must consider Davis's
12 testimony and further develop the record as needed.

13 Accordingly,

14 **IT IS ORDERED** that this case is remanded to the ALJ for a new hearing and
15 further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g). The Clerk of Court
16 should enter judgment and close this case.

17 Dated this 3rd day of September, 2020.

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19 
20 Honorable Lynnette C. Kimmins
21 United States Magistrate Judge
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23 ¹ When evaluating McNulty's ability to interact with others at Step Three, the ALJ
24 stated that: "He exhibited the ability to cooperate, ask for help when needed, and state her
25 [sic] own opinion. He was able to understand and respond to social cues; respond to
26 requests, suggestions, criticism, correction and challenges; and keep social interactions free
27 of excessive irritability, sensitivity, argumentativeness or suspiciousness." (AR 19.) She
28 also found McNulty "capable of responding to demands . . . [and] distinguishing between
acceptable and unacceptable work performance." (*Id.*) The ALJ provided no citation for
these findings, and her opinion offers no support for them. The Defendant did not rely upon
them or identify any record evidence to support such conclusions. Given the ALJ's use of
the wrong pronoun and the absence of any functional evaluations in the record, it is possible
this language was erroneously copied from another decision. Because there is not
substantial evidence to support these findings, they do not impact the Court's evaluation
of the ALJ's failure to consider Davis's testimony.